

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 165 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

RAYAN JUTH VIVIDH KARYAKARI SAHKARI MANDLI

Versus

I. PUNSHI B MATANG & Another.

Appearance:

MR HD VASAVADA for Appellant.

MR BS SUPEHIA for Respondent No. 1

PUBLIC PROSECUTOR for Respondent No. 2

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 07/10/1999

ORAL JUDGEMENT

Being aggrieved by the judgment and order dated 29th February 1988 passed by the then learned Judicial Magistrate (F.C.) at Mandvi, in Criminal Case No. 458 of 1984 on his file, acquitting the respondent No.1 relating to the offence punishable under Section 408 of Indian Penal Code, the original complainant has filed this appeal calling in question the legality and validity of the acquittal order.

2. Necessary facts may, in brief, be stated. At

Moti Rayan in Taluka Mandvi there is a co-operative society called Rayan Juth Vividh Karyakari Sahakari Mandali. The society grants agricultural loan and also provides necessary things required for agricultural operation to its members. The respondent No.1 was appointed as Clerk by the society in 1967-68. In 1980, the respondent No.1 was assigned with the duties of keeping in custody the goods in stock, cash, books of accounts, stock register and other records of the society. He had also to write books of accounts, maintain the stock of different goods in which the society was dealing in and the balance on hand. From 14th May 1984, he stopped to resume the duties and without any intimation continued to remain absent from his duties. He had not entrusted the cash, books of accounts and other registers to any one. The executive body of the society in the presence of panchas broke open the cup-boards as the key was with the respondent No.1. The account books and other files were found from the cup-board, but cash was found missing. The goods in stock was then tallied with the last entries made in the stock register. It was found that goods worth the sum of Rs. 1318.57 ps., were not tallying with the stock register. Shri Dayaram Yadav, the then Auditor audited the accounts and confirmed the fact that the respondent No.1 might have committed the offence of misappropriation by disposing of different goods to the tune of Rs. 1318.57 ps. A complaint was then lodged with Mandvi police station. After the completion of the investigation chargesheet against the respondent No.1 came to be filed in the Court of Judicial Magistrate (F.C.), Mandvi. The then learned Judicial Magistrate framed the charge against respondent No.1 to which he pleaded not guilty. The prosecution led necessary evidence. Appreciating the evidence on record, the learned Magistrate acquitted the present respondent No.1 on 29th February 1988. It is against that order of acquittal, the present appeal is filed, not by the prosecution, but, by the complainant-the society.

3. Mr. H.D. Vasavada, the learned advocate for the appellant contents that the learned Judicial Magistrate erroneously appreciated the evidence on record, and ignoring the requirements of law reached the conclusions which are not at all tenable. The reasons assigned by the learned Judge are not logical. The evidence on record was sufficient to hold respondent No.1 guilty of the offence with which he is charged. Now-a-days, misappropriation in co-operative societies are going berserk and therefore the courts must heavily come down upon those who are misappropriating the societies' fund

and making the societies to the stubbles.

4. It should hardly be stated that the prosecution is in law has to prove the charge beyond reasonable doubt. The prosecution cannot take the advantage of the weaknesses in the case of defence if alleged. The prosecution cannot lead insufficient or scanty evidence and then leave the court to raise inferences or conjectures having no scope in criminal law. If the prosecution fails to establish the charge beyond every reasonable doubt, the Court cannot heavily come down upon the accused as submitted. In that case, the law ordains to acquit the accused.

5. Before I proceed to examine the evidence on record, it may be stated that ordinarily order of acquittal are not to be lightly disturbed. This Court can interfere in the order of acquittal if it is found that the approach of the trial court is manifestly erroneous and the conclusions drawn are wholly unreasonable and perverse, and the principle, where two views are reasonably possible court ordinarily does not interfere, is not applicable. For such view, a reference to a case of *Bharwad Jakshibhai Nagjibhai & Others vs. The State of Gujarat* 1996 (1) GLH 226, may be made. Keeping this principle in mind, I now proceed to examine the evidence on record. The evidence of the Auditor recorded at Exhibit 49 in terms establishes that stock of different goods on hand when tallied with the stock register was found short, and shortage was to the tune of Rs. 1318.57 ps. The accused who was attending the office regularly stopped to attend the office and discharge his duties from 14th May 1984 because in connection with a complaint lodged with the police, he was, as submitted, arrested and he remained on bail upto 29th March 1985. No one was knowing why the respondent No.1 was not attending the office and therefore the panchas were called and breaking open the cupboards different records were brought out and thereafter the Auditor was assigned with the work of finding out misappropriation etc., if any. The Auditor then found out shortage of the goods of Rs. 1318.57 ps., as stated above. The question, however, that remains to be examined is whether the respondent No.1 can be fastened with the liability of the shortage found out by the Auditor.

6. In order to establish the offence of misappropriation, i.e., criminal breach of trust, the prosecution has to prove that the accused was in any manner entrusted with the property or with any dominion

over the property, and he thereafter dishonestly misappropriated or converted to his own use that property, or dishonestly used or disposed of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract touching the discharge of such trust. Hence, entrustment or dominion over the property, being one of the essential requirements, must clearly be proved by the prosecution adducing necessary evidence. In the case of co-operative societies, duties to different staff members are assigned, and passing necessary resolution, the duties about maintenance of account books, money to be kept on hand and maintenance of other files and records are allocated. It is pertinent to note that no such resolution, entrusting the cash and account books to the present respondent No.1, is produced. The learned advocate representing the appellant and learned APP for the State, after labouring much, failed to point out any resolution, regarding entrustment of the properties, passed. There is, thus, no evidence on record showing entrustment or dominion over the properties. Naranbhai, the President of the Society and Bhailalbhai, the Secretary of the society, have in their evidence, Exhibits 26 and 40 respectively, made it clear that many times the account books were being written by the Secretary Bhailalbhai and at times, the respondent No.1 was writing. Thus, few others were writing books of accounts and as such they used to keep stock & cash in their custody. From time to time, custody, it appears was being changed. It is not made clear who wrote the books of accounts during the period relating to which misappropriation could be noted. It is, therefore, possible that misappropriation may be by some one else or by some one not yet known as all the while the respondent No.1 was not writing the books of account and he had not to, when he was not writing the books of account, check the cash on hand or stock of the goods physically verifying the same. No doubt, the report of the Auditor shows about misappropriation, but it is not helpful to the court in any way for fastening the liability on the respondent No.1. Periodically, the stock on hand was being physically verified and endorsement thereof was also being made in the relevant registers. Regarding that no evidence has been led. The learned Judge was, therefore, in view of the above discussion, right in acquitting the respondent No.1, because entrustment to and misappropriation by respondent No.1, are not, with certainty, established by the prosecution.

6. For the aforesaid reasons, the appeal, being devoid of merits, is required to be rejected and is

accordingly rejected, maintaining the order of acquittal.

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